Decision 05-04-030 April 7, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Amend General Order 77-K.	Rulemaking 03-08-019 (Filed August 21, 2003)
Application of Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Company (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Company (U 1009 C), Global Valley Networks (U 1008 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Company (U 1012 C), Pinnacles Telephone Company (U 1013 C), The Ponderosa Telephone Company (U 1014 C), Sierra Telephone Company (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C), Winterhaven Telephone Company (U 1021 C) for Rehearing of Decision 04-08-055.	

ORDER MODIFYING DECISION 04-08-055 AND DENYING REHEARING OF THE DECISION AS MODIFIED

General Order (GO) 77 has for many decades required utilities to file annual reports that include the names, titles, duties, and compensation data for all executive officers, attorneys, and employees receiving annual compensation above defined amounts that vary with the annual revenue of the utility. GO 77 reports have always been public, and have primarily been used in Commission proceedings involving rate-setting, utility reorganizations, and utility affiliate relationships. This information helps to ascertain if executive and employee compensation is within prevailing standards and if there is any cross-subsidization between utilities and affiliates that results in ratepayers being charged

with costs unrelated to utility services. (*See, e.g., Re Continental Tel. Co. of California,* Decision (D.) 86802 (1977) 81 CPUC 118; *Re AT&T Communications of California, Inc*. (*AT&T*), D.86-11-079 (1986) 22 CPUC2d 329; *Re Pacific Bell*, D.94-02-007 (1994) 53 CPUC2d 177; *Re Southern Pacific Transportation Company*, D.96-07-052 (1996) 67 CPUC2d 79; *Re Exempting Commercial Mobile Radio Service Providers from the Filing Requirements of General Order 77-K and General Order 104-A* (*CMRS*), D.98-09-024 (1998) 82 CPUC2d 45; and *Re Mountain Utilities*, D.99-12-006 (1999) 1999 Cal. PUC LEXIS 778.)

We issued Order Initiating Rulemaking (R.) 03-08-019 in response to a Petition for Rulemaking (P.) 02-12-039 filed by the Greenlining Institute/Latino Issues Forum (G/LIF). G/LIF asked that General Order (GO) 77-K, which had remained unchanged since its adoption in 1986, be modified to increase the compensation levels that trigger reporting requirements, and to require reporting of holding company executive compensation, management diversity, and philanthropic contributions.[1] G/LIF proposed that names not be included in GO 77 reports. (P.02-12-039; R.03-08-019 at p. 4.)

In R.03-08-019, we partially granted the G/LIF petition, narrowing the scope of the rulemaking to focus on whether: 1) compensation levels that trigger reporting should be increased and/or linked to changes in the U.S. Department of Commerce Gross Domestic Product Price Index; 2) Competitive Local Exchange Carriers (CLECs) and Nondominant Interexchange Carriers (NDIECs) should be exempt from the GO; and 3) information on utility employee names should be filed as confidential material subject to Public Utilities Code § 583[2], which limits disclosure of information furnished by a utility unless disclosure is required by law, by an order of the Commission, or by the Commission or a Commissioner during the course of a proceeding. R.03-08-019 noted that some parties recommended that GO 77-K reports

[1] Most previous modifications of GO 77 changed only the compensation level that triggered reporting.

[2] All statutory references are to the California Public Utilities Code unless otherwise indicated.

should be submitted without names, or that name-specific information not be open to public inspection. (R.03-08-019 at p. 13.) We explained that while we need names of employees to make the information meaningful, we would, as part of the rulemaking, explore whether the information "should be subject to Pub. Util. Code § 583." (*Id.*)

In D.04-08-055, we: 1) adopted GO 77-L (which substantially increases the compensation levels that trigger reporting and thus greatly reduces the number of individuals identified in GO 77-L reports, and consolidates reporting requirements for previously separate tiers of utilities); 2) exempted CLECs and NDIECs from reporting requirements; 3) gave utilities the option of filing employee names in GO 77-L reports as confidential material "subject to Pub. Util. Code § 583," on the condition that utilities that take this option also file a copy of the entire report for public inspection, with employee names redacted.[3] D.04-08-055 stated that the confidentiality of the names of executive officers and attorneys identified in the GO was not within the scope of the rulemaking. (D.04-08-055 at p. 8.) D.04-08-055 expanded the rulemaking to solicit comments regarding the reporting of holding company executive compensation, and executive compensation and bonuses awarded in the reporting year, but not yet paid. No final second phase decision has been issued.

A group of telecommunications utilities which collectively identify themselves as "Small LECs," and which include Calaveras Telephone Company, Cal-Ore Telephone Company, Ducor Telephone Company, Foresthill Telephone Company, Global Valley Networks, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Company, The Ponderosa Telephone Company, Sierra Telephone Company, The Siskiyou Telephone Company, Volcano Telephone Company, Winterhaven Telephone Company (Applicants) jointly filed a timely application for rehearing of D.04-08-055.

Applicants allege that our decision violates privacy rights of their executive officers, attorneys, and other highly compensated employees, as guaranteed by the federal

[3] Hereafter, we use the term "GO 77 reports" to refer to reports required by either GO 77-K or 77-L.

and state constitutions, the California Public Records Act (CPRA) (Gov. Code § 6250 et seq.), and the Information Practices Act (IPA) (Civ. Code § 1798 et seq.). Applicants also argue that we err in failing to construe § 583 and GO 66-C to preclude public access to GO 77 reports.

SBC California (SBC) filed a response supporting the application for rehearing. SBC argues that D.04-08-055 should be modified to protect all individually-identifiable information in GO 77 reports, including the title and duty of each employee. SBC states that the Commission has long protected the privacy rights of consumers, and should similarly protect the same privacy rights of employees of utilities complying with GO 77. SBC claims: "There is no dispute that a utility employee has a legally protected privacy interest in his/her salary information and a reasonable expectation that such information will remain private." (SBC Response at p. 1.) SBC acknowledges that "The Commission permits public disclosure of G.O. 77 reports pursuant to its own policy on open records." (*Id*. at p. 2.)

We have reviewed each allegation raised in the application for rehearing, and SBC's response, and find there is good cause to modify D.04-08-055 to clarify our policy regarding the future use of GO 77 reports. Because our modifications are based on the existing record, and concern matters not susceptible to resolution in an evidentiary hearing, we find no good cause to hold such a hearing here. We will, therefore, deny rehearing of D.04-08-055 as modified herein.

I. DISCUSSION

A. The Commission's Decision To Refrain From Reversing Its Longstanding Practice Of Making GO 77 Reports Available To The Public Is Consistent With The Federal And State Constitutions, The California Public Records Act (CPRA) And The Information Practices Act (IPA).

Applicants argue that individual privacy rights are guarded by both the federal and California constitutions, but do not develop the federal constitutional argument beyond claiming that the First, Fourth, Fifth, Ninth, and Fourteenth amendments of the federal constitution create a privacy right that includes the "individual

interest in avoiding disclosure of personal matters" (*Chico Feminist Women's Health Center v. Scully* (*Chico*) (1989) 208 Cal. App. 3d 230, 241).[4] Applicants contend that the California Constitution more explicitly protects individual privacy, with a 1972 amendment adding privacy to a list of the inalienable rights of California citizens. Applicants claim that, according to *People v. Wiener* (1994) 29 Cal. App.4th 1300, 1311, the principle purpose of this amendment is to protect individuals against government and business collecting unnecessary information and misusing information gathered for one purpose to serve other purposes or to embarrass. Applicants state that to show that a government agency has unlawfully disclosed private, personally identifiable information, a claimant must demonstrate: (1) a specific, legally protected privacy interest, (2) a reasonable expectation of privacy; and (3) a serious violation of privacy (*Teamsters Local 856 v. Priceless, LLC* (*Teamsters*) (2003) 112 Cal. App.4th 1500 at 1511-1523; *Hill v. NCAA* (*Hill)* (1994) 7 Cal.4th 1). A serious invasion of privacy may be justified by an important countervailing state interest, Applicants state. They contend, however, that we could not justify public disclosure of GO 77 reports since disclosure to the Commission alone would meet our interests in reviewing such information for ratemaking purposes.

The three part analysis first set forth in *Hill*, *supra*, and since reiterated in *Teamsters*, *supra*, and elsewhere, provides a useful starting place for analyzing constitutional and statutory privacy interests. Our analytical outcome differs from Applicants, however, in that we do not believe that Applicants' executive officers, attorneys, or other highly compensated employees have an objectively reasonable expectation of privacy in their names, titles, duties, and compensation, given our decades old practice of making such information public. Nor do we believe GO 77 seriously invades privacy. Further, we do not believe Applicants have standing to litigate causes of action based on their individual employees' constitutional or statutory privacy rights. We also note that *Teamsters* recognizes that CPRA exemptions related to privacy are

[4] Applicants state that *Roe v. Wade* (1973) 410 U.S. 113, 152 explains the constitutional origin of the privacy right, but do not explain specifically how federal law applies to our continued disclosure of GO 77 reports. We agree that the United States Constitution provides nonspecific privacy rights but decline

discretionary, rather than mandatory, and thus that such exemptions do not forbid public disclosure of personal information. (See *Teamsters*, *supra*, 112 Cal 4th at p. 1511.)

1. Legally Protected Privacy Interest.

Applicants argue that the financial information submitted in GO 77 reports is at the core of the privacy interests protected by Article 1, § 1 of the California Constitution, citing *Schnabel v. Superior Court* (1993) 5 Cal.4th 704 which holds that payroll tax information is not discoverable in civil litigation. Applicants also cite *Teamsters*, *supra*, for the point that the California Constitution privacy provisions are designed to safeguard "certain intimate and personal decisions from governmental interference in the form of penal and regulatory laws." They assert that we violate this interest by continuing to make public GO 77 reports that include individually-identifiable information. (Application for Rehearing at p. 9.)

Applicants maintain that the CPRA and IPA echo the Article 1, § 1 concern with public disclosure of private financial information. The CPRA is intended to protect privacy, as well as to provide broad public access to government records. As Applicants point out, the CPRA includes several exemptions from disclosure that may be asserted by an agency in order to limit public access to personal information. These exemptions include: 1) an exemption for "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" (Gov. Code § 6254 (c)); 2) an exemption for "records, the disclosure of which is exempted or prohibited pursuant to federal or state law…" (Gov. Code § 6254 (k)); and 3) a "catch-all" exemption that applies where a record may not be subject to an explicit exemption, but an agency demonstrates that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure (Gov. Code § 6255 (a)). Applicants state that "the exemptions to the CPRA forbidding public disclosure of designated information are 'analyzed under essentially the same balancing test'" used to determine whether an invasion of constitutional privacy rights

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to develop Applicants' vague federal argument further.

has occurred, citing *Teamsters*, *supra*, 112 Cal. App.4th at p. 1511 (applying test to "catch all" CPRA exemption under Gov. Code § 6255). (Application for Rehearing at p. 8.)

Applicants claim that while the IPA explicitly authorizes the disclosure of personal information in accord with the CPRA (Civ. Code § 1798.24 (g)), the existence of CPRA exemptions relevant to privacy means the disclosure requirements of the CPRA do not apply to GO 77 reports, and that, therefore, Civ. Code § 1798.24 (g) does not apply to such reports.[5]

While utility employees, like other individual California citizens, have constitutionally based privacy interests which include an interest in controlling the disclosure of detailed personal financial information, the extent of a privacy interest is dependent on the circumstances. (*Hill*, *supra*, 7 Cal.4th at pp. 35-37.) Applicants exaggerate the scope and sensitivity of GO 77 reports, and imply that our disclosure of basic name, title, duty, and compensation information invades privacy to the same extent as would the disclosure of personal bank account numbers and transaction details, personal tax records, detailed personnel records, social security numbers, mothers' maiden names, and similarly truly sensitive information which courts routinely find subject to reasonable expectations of privacy. We have in past decisions rejected similar utility mischaracterizations of the scope of GO 77, and implications that the GO is more invasive than it is.[6]

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[5] The IPA gives individuals the right to see most government records that pertain to them, and imposes certain limits on other disclosures of personal information.

[6] *See Re Pacific Bell* [*Application by Pacific Bell and Roseville Telephone Company for amendment of GO 77-K to eliminate requirements that utilities report by name all employees making over a minimum salary*] D.94-02-007, *supra*, 53 CPUC2d at p.181: "In their opening brief, PacBell and Roseville frame the issue in these words: 'The specific, narrow issue raised in this proceeding therefore is, simply stated: Whether an individual, by virtue of accepting employment with a public utility within this state, waives his/her right to privacy in regard to the public dissemination of his/her personal financial information.'

We submit that applicants' statement of the issue is far too broad and all-encompassing to accurately describe the GO 77-K reporting requirement, and as a result misses the mark. In phrasing the issue as they do, applicants infer a 'gossipy' Commission collecting and recklessly making wholesale distribution of any and all financial information, such as salary, payroll deductions of any kind and description, including court ordered payments, garnishment orders, investments in retirement plans, stock purchases, etc., of *any and all* utility employees ranging from the highest officer of the utility down to the newest entry-level employee, as the price of working for a utility under the regulatory jurisdiction of this

Applicants' reliance on the CPRA and the IPA as sources of a privacy interest barrier to disclosure of GO 77 reports is ill-founded. Neither the CPRA nor the IPA explicitly prohibit the disclosure of names and compensation information, or otherwise create an individual privacy interest that requires us to reverse our longstanding disclosure practices.

The CPRA requires us to make records available to the public unless they fall within one or more of the specific exemptions set forth in the CPRA, or we find that on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. (Gov. Code § 6255 (a).) Obviously, if we found a constitutional provision or statute expressly forbidding disclosure of the type of information in GO 77 reports, we would assert the Gov. Code § 6254 (k) exemption which covers "records, the disclosure of which is prohibited by law." In other situations, however, our assertion of an exemption depends upon our evaluation of the applicability of the exemption and of the wisdom of asserting it in a particular case. Indeed, the CPRA specifically informs agencies that, "[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater public access to records than prescribed by the minimum standards set forth in this chapter." (Gov. Code § 6253 (e).)

Contrary to Applicants' apparent assumption, CPRA exemptions are permissive, rather than mandatory, and an agency may, but is not compelled to, assert the exemptions in a particular circumstance. (*Teamsters*, *supra*, 112 Cal. App.4th at p. 1511; *Black Panthers Party v. Kehoe* (1974) 42 Cal. App.3d 645, 656.) *Teamsters*, *supra*, 112 Cal. App.4th at p. 1511, recognizes the permissive nature of CPRA exemptions relevant to personal information:

> Consequently, section 6254 lists a number of exceptions to the disclosure requirements of the CPRA, including subdivision (c), which provides: "Nothing in this chapter shall be construed to require disclosure of records that are any of the following: … (c) [p]ersonnel, medical, or similar files, the

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Commission. That is utter nonsense and applicants know it."

> disclosure of which would constitute an unwarranted invasion of personal privacy." This statutory exception is permissive, meaning that public agencies may, but are not compelled to refuse to disclose the listed items. (*Black Panther Party*, *supra*, 42 Cal. App.3d at p. 656.)

Thus, our assertion of CPRA exemptions related to privacy depends on our discretionary determination that those exemptions apply and should be asserted.

Applicants concede that the IPA expressly authorizes us to disclose personal information pursuant to the CPRA. Civil Code § 1798.24 states in part that: "No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information is: … (g) Pursuant to the California Public Records Act." Their argument that we violate the IPA depends on their erroneous assumption that we are compelled to assert each CPRA exemption that they think we should assert, and that the existence of such exemptions means that Civil Code § 1798.24 (g) is inapplicable to our practice of making GO 77 reports available to the public.[7] Because the CPRA requires us to provide public access unless disclosure is prohibited by law, or the records are subject to an exemption we find applicable and choose to assert, Civil Code § 1798.24 (g) authorizes us to provide public access to GO 77 reports.

Since there is no explicit constitutional or statutory bar to disclosure of executive officer, attorney, and other highly compensated employee names, titles, duties, and compensation, and we do not believe our GO 77 disclosures are an unwarranted invasion of privacy, we need not assert Government Code § 6254 (k) or (c) exemptions to prevent the public from seeing such information.[8] Having for many years made GO 77

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[7] As *Teamsters*, *supra*, notes: "there is no express authority for a third party to bring an action to preclude a public agency from disclosing documents under the CPRA." (112 Cal. App.4th at p. 1508, footnote 6.) We believe that even if a state statute were enacted to allow third parties to seek to bar an agency from disclosing certain records, relief would only be granted if a law explicitly forbade disclosure, or if the record was subject to a privilege that the third party held, had not waived by providing the record to the agency, and was entitled to assert to bar disclosure.

[8] In *Teamsters*, *supra*, the court upheld a city's decision to assert Gov. Code § 6254 (c) largely on the basis that longstanding city confidentiality policies created reasonable expectations of privacy in compensation information. If our longstanding policies had favored confidentiality of GO 77

reports public, we would be hard pressed to find a creative rationale for now finding that the public interest in keeping such reports secret clearly outweighs the public's interest in disclosure, and justifies our assertion of the catch-all exemption in Gov. Code § 6255.

Recent amendments to the California Constitution reinforce the public's right of access to government information, and condition our ability to establish new limits on disclosure. Article 1, § 3 (b) now provides in pertinent part that:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
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> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings that demonstrating the interest protected by the limitation and the need for protecting that interest.
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> (3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent it protects that right of privacy ….[9]

Our construction of the CPRA and the IPA as allowing us to continue disclosing GO 77 reports is consistent with our new constitutional duty to broadly construe statutes that further the people's right of access to information.[10]

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information, rather than disclosure, we might have reached a similar result. Because our facts differed greatly, we reached a different, but equally valid, result.

[9] California Constitution Article 1, § 3 was amended by the passage of Proposition 59 (Stats. 2004, Res. c. 1 (S.C.A. 1) in the November 2, 2004 election. California Constitution, Article 2, § 10, and Article 18, § 4, provide in part that an initiative statute or referendum, or an amendment or revision of the Constitution, approved by a majority of votes thereon, takes effect the day after the election unless the measure specifies otherwise.

[10] Case law already required that CPRA exemptions that an agency can assert to limit disclosure be narrowly construed. California Constitution Article 1, § 3, expands the narrow construction requirement to all statutes, court rules, and other authority limiting the people's access to information, with the exception of laws protecting privacy. Article 1, § 3 remains neutral with respect to privacy laws. (*See*,

Having identified no constitutional or statutory privacy interest expressly prohibiting our longstanding GO 77 disclosure policy, we move on to the second step in the *Hill* analysis; an evaluation of expectations of privacy.[11]

2. Objectively Reasonable Expectation Of Privacy.

Applicants cite *Hill*, stating that a reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (*Hill*, *supra*, 7 Cal.4th at p. 37.) Applicants claim that as small, privately held companies, they do not publicly report employee or executive compensation information, and that their employees, like similarly situated employees in other industries, reasonably expect that their compensation will be kept confidential in internal company documents and personnel files. Citing *Teamsters*, *supra*, they assert that the fact that their employees work for utilities does not alter the reasonableness of their privacy expectations since citizens do not surrender constitutional privacy rights merely because their names appear in government records. Applicants reason that that even public employees have a reasonable expectation in the privacy of information in their personnel files. They claim, without citation, that where we have in the past requested such compensation information, they have been able to submit it subject to certain confidentiality guarantees.[12] Applicants cite D.04-08-055 to the effect that modern threats of identity theft using individually identifiable information have heightened employees' privacy expectations. In addition, they contend their need for privacy goes beyond that provided in *Teamsters*, where personnel materials were allowed to be disclosed with names redacted, since they have few employees and even without names it would be easy for

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Article 1, § 3 (b) (3).)

[11] If the mere existence of any privacy interest meant that any action that affected that interest was prohibited, there would be no need to undertake the three-part *Hill* analysis, since the mere finding of a privacy interest would be dispositive.

[12] We find such unsupported statements contrary to our expectation that all utilities subject to GO 77 have complied with the GO in a uniform manner.

someone to link compensation information to individuals. They claim we must redact their entire reports to protect such individuals.

We disagree with Applicants' analysis of reasonable expectations of privacy because it fails to take into account our longstanding policy of disclosing GO 77 reports to the public. It is not clear whether Applicants are genuinely unaware of this policy. In any case, we do not believe our longstanding public disclosure policy can support a legitimate objectively reasonable expectation of privacy.

Tom v. City and County of San Francisco (*Tom*) (2004) 120 Cal. App.4th 674, 683-684 states:

> "The extent of [a privacy] interest is not independent of the circumstances." (*Hill*, *supra*, 7 Cal.4th at p.36 ….) Other factors, such as advance notice of an impending action, may impact a person's reasonable expectation of privacy. (*Hill*, *supra*, at p. 36.) "In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Ibid*.) "A 'reasonable' expectation of privacy is an objective entitlement based on broadly based and widely accepted community norms." (*Id*. at p. 37.) "Finally, the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." (*Ibid*.)

Teamsters, *supra*, 112 Cal. App.4th at p. 1521, also notes the need to review disclosure expectations in a fact-specific manner.

> The critical point we extract from these federal cases is that financial privacy is a recognized interest and that each case is decided according to its facts after a careful balancing of the public interest in nondisclosure of individuals' names against the public interest in disclosure of that information.

Here, the evidence, in the form of our prior published decisions, shows that we have until D.04-08-055 routinely denied utility requests that we keep GO reports confidential. We expect utility executives, attorneys, and other highly compensated employees such individuals to be aware of our regulations and decisions, especially when the principles set forth in those regulations and decisions have remained essentially

unchanged for several decades. It is not objectively reasonable for such individuals to expect that we would act contrary to our own longstanding policies.

Applicants' overlook D.86-11-079, *supra*, in which we specifically rejected AT&T Communications of California, Inc.'s privacy based argument that GO 66-C limits disclosure of GO 77 reports. AT&T stated that it considered employee compensation to be an extremely sensitive matter, claimed that it needed to protect the privacy of its employees and preserve the confidentiality of the this information in the vigorously competitive California marketplace, and identified its GO 77 report as proprietary, to be used only as necessary by the CPUC staff. (22 CPUC2d at pp. 393-394.) Toward Utility Rate Normalization (TURN)[13] argued that GO 77 did not contain a provision for confidential treatment, and that "this information is expressly not confidential under GO 66-C, which provides in part at Section 2.5 that "Public records not open to public inspection include … personnel records, *other than present job classification, job specification, and salary range*." (22 CPUC2d at p. 393 (Emphasis added by TURN.).) We stated, in D.86-11-079, *supra*, 22 CPUC2d at p. 394:

> We agree with TURN in this instance that a respondent's GO 77-J Reports, which by definition require reporting of data on specifically named and designated employees, are a matter of public record; they are precisely the type of information subject to disclosure under § 2.5 of GO 66-C (records on present job classification, job specification, and salary range). In addition, GO 77-J itself does not provide for the confidential treatment of respondents' data.

Applicants' current confidentiality arguments largely mirror those raised by Pacific Bell [now SBC California] and Roseville Telephone Company in Application (A.) 92-04-013, Pacific Bell's third attempt to persuade us to amend GO 77-K to eliminate employee names.[14] In D.94-02-007, *supra*, 53 CPUC2d 177, 180, we noted that:

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[13] TURN is now "The Utility Reform Network."

[14] Roseville did not object to the reporting requirements, but requested that the names of employees be not made public or released to persons outside the Commission. Neither Pacific Bell nor Roseville requested that the requirement for reporting names and salaries of executive officers be modified. (D.94-02-007, 53 CPUC2d at pp. 178, 181.)

> Applicants argue that: (1) California recognizes a fundamental right of privacy in personal information, including personal financial information; and (2) Disclosure of the specific names of non-officer employees constitutes an unwarranted intrusion of Privacy under the provisions of the California Public Records Act.

We ultimately concluded that: "we find GO 77-K's employee identification requirement proper and in the public interest." (53 CPUC2d at p. 181.)

In D.99-12-006, *supr*a, 1999 Cal. PUC LEXIS 778, ** 24-25, we reiterated our need for compensation information in the ratemaking context, and adopted a rate case settlement only on the condition that it be modified to eliminate a provision of the settlement that would have exempted a small water utility from GO 77 filing requirements:

> G.O. 77 has a long-standing history. In proposing to change Commission policy, parties should explicitly review prior Commission policies and explain in a meaningful manner the basis for departing from such policies. Here, settling parties have done neither. The settlement agreement makes no review of Commission policy regarding G.O. 77. Further, the settlement agreement justifies its basis for departing from past Commission policy with the summary position that applicant has: "… significant concerns about the privacy rights of personnel who perform tasks part time under the management services agreement with KAI… Most such personnel took employment with a private entity, KAI, with no understanding that their salaries, if they exceed the threshold amount stated in G.O. 77, could be made public."
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> In the past, the Commission has made exceptions to G.O. 77 reporting requirements. However, such exceptions have been limited to situations involving entities that are no longer subject to rate regulation by this Commission, e.g., cellular telephone companies and railroads.[15] However, the

[15] *See, e.g.*, D.98-09-024, *supra*, which exempted Commercial Mobile Radio Service Providers (CMRS) from General Order 77-K and 104-A requirements on the ground that, since we no longer had authority to regulate CMRS rates, the original purpose of requiring CMRS providers to comply with GOs 77-K and 104-A had vanished. We emphasized that: "We may still require CMRS providers to report some or all

> information regarding salaries is warranted in setting rates, particularly in this instance in which an affiliate is involved. In D.94-02-007, we addressed and dismissed concerns similar to those of MU regarding the "right of privacy."

In light of our decisions rejecting prior requests that we reverse our practice of disclosing names in GO 77 reports, we do not believe that Applicants' executive officers, attorneys, or other highly compensated employees could have any objectively reasonable expectation of privacy in the information in such reports.

We are not impressed by Applicants' argument that, because of their small size, their employees will especially suffer from public disclosure of any part of their GO 77 reports, even if we permit the names of such employees to be redacted. To the extent Applicants are currently subject to GO 77, and have complied with its reporting requirements, the public already has access to the information in those reports. In the absence of any evidence that unredacted GO 77 reports have been viewed and abused by criminals, we find Applicant's fears regarding the potential abuse of redacted reports an insufficient reason for precluding public access to such reports.

Having identified no objectively reasonable expectation of privacy regarding information included in GO 77 reports, we move on to evaluate the seriousness of our thirty plus year alleged "invasion" of the privacy of highly compensated utility employees.

3. Serious Invasion of Privacy

The third element an individual would need to prove in order to prevail on an invasion of privacy lawsuit would be a serious invasion of privacy. Applicants imply that by disclosing names, titles, duties, and compensation in GO 77 reports we have for decades disregarded expectations of privacy and left their executives, attorneys, and other highly compensated employees wide open to identity thieves. We believe these arguments are unfounded.

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of the information required in these General Orders if the need arises in a complaint case, an investigation, or other circumstances." (82 CPUC2d at p. 48.) (Footnote added.)

D.94-02-007, *supra*, 53 CPUC2d at p. 182, pointed out that although the rulemaking in that proceeding was served on 532 utilities, and the ALJ in that proceeding directly asked the parties to provide evidence of any utility officer or employee who suffered any specific harm or embarrassment as a result of disclosure required by GO 77-K, only one party responded with a specific example, and this party had its tongue clearly in its cheek: Public Advocates responded:

> It is possible that [name and job title of individual] has suffered embarrassment by the disclosure of his 1.8 million dollar salary in the context of [name of company by whom that individual is employed] seeking a 60% rate hike and supporting a 25% cut in welfare benefits.

We concluded that: "Applicants' fears appear to be more imaginary than real…." (*Id.*)

In the current rulemaking, we have similarly received no information from any utility regarding any individual allegedly harmed or embarrassed by their employer's compliance with GO 77. Nor have we been made aware of any informal or formal complaints, or petitions for rulemaking, submitted by any such individuals.

Unlike the facts addressed in *Teamsters*, *supra*, where a union fought against a city's disclosure of employee names and compensation, no union appeared in the current rulemaking. In 1994, when we rejected requests that we eliminate non-executive officer names from GO 77 reports, a union representing a large number of utility employees – the Communications Workers of America (CWA) - weighed in on the side of disclosure.[16]

GO 77 reports disclose roughly the same information as the state discloses regarding state executive officers and many high level employees.[17] Names and titles are posted on the internet in organization charts for state agencies. Duty statements, and

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[16] "CWA urges that if any right of privacy exists with regard to the earnings of one employed by a public utility, it is outweighed by the public interest in disclosure." (D.94-02-007, 53 CPUC2d at p. 180.)

[17] This discussion regarding state employees is based on five minute's internet research, and not on information in the record. We mention it as a point of interest, not as a basis for our decision.

salary ranges, are also posted. Names, titles, duties, and salary are easily linked, yet this has not been considered an invasion of privacy.

In *Tripp v. Department of Defense* (*Tripp*) (D.D.C. 2002) 193 F.Supp.2d 229, 236, a federal court dismissed federal privacy act claims based on an agency's disclosure of salary information, noting among other things that:

> The GS-level and salaries of public officials are "information … traditionally released by an agency to the public without a [] FOIA request," *Bartel v. FAA*, 725 F.2d 1403, 1413 (D.C. Cir. 1984). … *see also* H.R. 93-1416, 93d Cong. 2d Sess. at 13 (Oct. 2, 1974) (indicating that Congress did not intend the Privacy Act to prohibit the disclosure to the public of information such as "names, titles, salaries, and duty stations of most Federal employees"). … The Court agrees that the names, titles, salaries, and salary-levels of public employees are information generally in the public domain. *See also National Western Life Ins. Co, v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980).

Although the federal Privacy Act does not apply GO 77 reports, clearly the disclosure of names, titles, duties, and salaries is not universally viewed as a serious invasion of privacy.

We conclude that, because of our longstanding disclosure policy, we did not violate any constitutional privacy rights in D.04-08-055. While we agree that individuals have a reasonable expectation that they may control most disclosures of records regarding *detailed* financial transaction of a generally confidential nature, we do not believe the disclosure of names, titles, duties, and compensation in GO 77 reports either interferes with reasonable privacy expectations or seriously invades informational privacy.

4. Countervailing interest

Applicants argue that to overcome a serious privacy violation of the nature created by GO 77, we must show an important countervailing interest in disclosure. They claim we cannot do so because GO 77 reports are strictly intended to be used in the ratesetting process, and disclosure to the Commission alone would suffice. Even if we showed an important interest in disclosure, they assert, we should have limited disclosure to parties demonstrating an individualized compelling need for the information.

We do not share Applicant's belief that we seriously invade privacy, and note that privacy interests are not all equal. Where a case involves obvious invasions of interests fundamental to personal autonomy, such as freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a compelling state interest may be necessary to overcome vital privacy interests, but where privacy interests are less central, or are in dispute, a general balancing of interests is undertaken. (*Hill*, *supra*, 7 Cal.4th at p. 34.)

Long ago, in D.94-02-007, we explained that we needed names in GO 77 reports:

> Since their interests are best served by prices for utility services being kept at the lowest possible level, the ratepayers have a very real interest in seeing that costs of producing the goods and services used by them are kept at a minimum. This includes the salaries and compensation of utility officers and employees. The ratepayers have a right to know what costs, including salaries and expenses, they as ratepayers are, in effect, reimbursing to the utility, and whether those salaries and expenses are comparable to or in line with those of others performing similar services in like industries. They further have a right to know whether the utility is engaging in "cross-subsidization" whereby they, as ratepayers, are burdened with costs unrelated to the services for which the ratepayers are being charged.
>
> The most reliable manner of reviewing records to make determinations such as the above is by name. …
>
> The reason for this is simple. We, as humans, are more practiced in name recognition than any other method of identification ...
>
> For all of the above reasons, we find and conclude that name reporting is of great value, that the application to amend GO 77-K to delete such name reporting should be denied, and GO 77-K should remain as presently worded.

(53 CPUC2d at p.183; *see also*, D.96-07-052, *supra*, 67 CPUC2d 79, 80-81.)

We continue to find the use of names critical to our effective implementation of our regulatory responsibilities, and that the public interest in the use of highly

compensated employee names for this purpose outweighs the minimal privacy interests associated with disclosure of such names during our proceedings. During proceedings in which GO 77 information may be relevant, the use of names helps us determine whether a particular individual has been over-compensated, or whether a particular employee associated with a non-regulated affiliate has been improperly compensated by a utility. The use of mere job titles or similar less personalized information provides less assurance that improprieties will be identified.

D.04-08-055 refines our prior disclosure practices by authorizing utilities to file a public report with employee names redacted, so long as they also file a full unredacted version for use in our proceedings. We understand that this approach does not comport with Applicants' desires that we bar all public disclosure of GO 77 reports, but it does reflect our recognition that there are sometimes different ways to meet our regulatory information needs.

To sum up our review of Applicants' constitutional privacy arguments: we believe that utility employees, like other citizens of California, have some interest in limiting the disclosure of detailed personal financial information but do not find this interest requires reversal of our disclosure practices. Applicants' executives, attorneys, or other highly compensated employees cannot have an objectively reasonable expectation in the privacy of information in GO 77 reports, given our longstanding full disclosure practices. Nor does our disclosure of these reports result in a "serious" invasion of privacy. The need for the disclosure of names during Commission proceedings in which GO 77 reports may be relevant outweighs any competing privacy interest. Therefore, we find that D.04-08-055 does not violate constitutional privacy interests. As an element of our analysis, we also find that our decision did not violate the CPRA or the IPA, since neither of these statutes forbids our disclosure of the information in GO 77 reports.

B. Section 583 And GO 66–C Do Not Require That We Begin Keeping GO 77 Reports From The Public

Applicants assert that all information in GO 77 reports that could be used to trace compensation information to particular employees or officer is information of a

confidential nature that has been furnished to the Commission, and thus falls within the protection of § 583 and GO 66-C. They quote § 583, which provides in pertinent part:

> No information furnished to the commission by a public utility … except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner during the course of a hearing or proceeding.

GO 66-C § 2.2 elaborates on § 583, Applicants argue, providing that "public records not open to public inspection include … records or information of a confidential nature furnished to, or obtained by the Commission. (See P.U. Code §§ 583 …)."

Applicants misunderstand the language and nature of § 583. Section 583 does not limit our ability to disclose information. As the United States Court of Appeals for the Ninth District noted in *Southern California Edison Company v. Westinghouse Electric Corporation* (9th Cir. 1989) 892 F. 2d 778, 783: "Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted." Similarly, *Re Southern California Edison Company* [Mohave Coal Plant Accident], D.91-12-019 (1991) 42 CPUC 2d 298, 300, states that § 583 "assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission" but does not limit our broad discretion to disclose information. [18]

We exercised our authority under § 583, and implemented our responsibility under Gov. Code § 6253.4 (a) by adopting GO 66-C as our guidelines for public access to

[18] D.91-12-019 notes: "Section 583 does not create for a utility any privileges of nondisclosure. Nor does it designate any specific types of documents as confidential. To justify an assertion that certain documents cannot be disclosed, the utility must derive its support from other parts of the law." (42 CPUC2d at p. 301.) That decision later states: "Further, simply citing Section 583 does not establish the confidentiality of a document. Section 583 does not discuss or define confidentiality, nor establish any privileges. In order to protect documents that would otherwise be released pursuant to Section 583, the utility must find its authority or relevant policy elsewhere." (42 CPUC2d at pp. 302-303.)

Commission records.[19] These guidelines were adopted in Resolution L-151 "[i]n compliance with the legislative mandate and policy expressed in" the CPRA, and are required by Government Code § 6253.4 (b) to be consistent with the CPRA and reflect the intention of the Legislature to make agency records available to the public.

Perhaps the biggest flaw in Applicants arguments regarding GO 66-C is that the fact that they overlook D.86-11-079, *supra*, in which we specifically rejected AT&T Communications of California, Inc.'s privacy based argument that GO 66-C limits disclosure of GO 77 reports largely on the ground that GO 66-C § 2.5 provides for the disclosure of the personal information in such reports. We noted this decision in our discussion of the reasonableness of Applicants' expectations of privacy. We will not repeat this discussion, beyond once again quoting that: "a respondent's GO 77-J Reports, which by definition require reporting of data on specifically named and designated employees, are a matter of public record; they are precisely the type of information subject to disclosure under § 2.5 of GO 66-C (records on present job classification, job specification, and salary range)." (22 CPUC 2d at p. 394.)

Applicants' arguments are flawed in other respects as well. They note that GO 66-C § 2.2 provides that "public records not open to public inspection include … records or information of a confidential nature furnished to, or obtained by the Commission. (See P.U. Code §§ 583 …)." If applied as proposed by Applicants, however, GO 66-C § 2.2 would have the absurd result of rendering confidential any information furnished by utilities, except information expressly made public by the portion of the Public Utilities Code referenced in § 583.

GO 66-C § 2.2, and a number of specific exclusions in GO 66-C that are not directly linked to specific statutes or CPRA exemptions, may most productively be viewed as acknowledgements of our willingness to consider treating designated

[19] The Commission may exercise its authority under § 583 through broad orders such as GO 66-C, or through narrowly focused orders in a single proceeding. Nothing in § 583 limits our options to a utility by utility, or case, by case analysis of disclosure issues. Our decisions include many examples of both styles of order.

information as confidential where we can do so in a manner consistent with the law, and with common sense. Often, a balancing of interests is involved.

By authorizing utilities to submit a public GO 77 report with employee names redacted, and a complete report "subject to § 583," we balance the desireability of limiting easy public access to information linking individuals and compensation, with the need for access to complete GO 77 reports in our ratesetting and other proceedings in which this information may be useful. Section 583 does not prevent disclosures authorized by the Commission or a presiding officer during the course of a proceeding.

As we state in D.91-12-019, *supra*, "In General Order 66-C, the Commission delegates to the presiding ALJ the authority to rule on requests for disclosure in specific cases." (42 CPUC 2d at p. 301.) Therefore, any party desiring to review individual names in unredacted GO 77 reports in order to determine whether the names may be relevant or useful during the party's participation in the proceeding may file with the presiding officer a request for access to such reports, and presiding officers are authorized to grant such requests as appropriate. Given the public access principles of Article 1, Section 3 of the California Constitution, the CPRA, and our recognition of the usefulness of such information in ratesetting and other proceedings involving compensation issues, we anticipate that requests will generally be granted.[20]

D.04-08-055's references to § 583 may reflect common misunderstandings regarding the impact of that statute. For this reason, we will amend the decision to clarify that parties to our proceedings may request access to unredacted GO 77 reports, and that we may, in other appropriate circumstances, exercise our § 583 authority to make unredacted GO 77 reports public.

C. Scope of Rulemaking

Applicants argue that scope of R.03-08-019 was not limited to the consideration of whether to limit public disclosure of only the names of employees who

[20] In our proceedings, the need to disclose to the public staff reports and information derived from utility documents is presumed. "The utility bears the burden to demonstrate why any particular document … should be withheld from public disclosure." (*Id*.)

were not executive officers or attorneys. They note that executive officers and attorneys are also utility employees, and have privacy interests similar to those of other employees.

When we stated in R.03-08-019 that we need public utility employee names to make the information in GO 77 reports meaningful, but were nonetheless going to consider to make the names subject to the conditional limit on public disclosure available under § 583, we did not state that we would only consider conditional limits on the disclosure of the identities of only those employees who were not executive officers or attorneys. Nor did we state that we would consider limits on disclosure of the names of executive officers and attorneys. Our D.04-08-055 interpretation of our own intent as being limited to the consideration of limits on public disclosure of the names of highly-compensated utility employees other than executive officers and attorneys does not amount to legal error.

In reviewing the record, we note that G/LIF, in the Petition which originally inspired this rulemaking, proposed that we amend GO 77-K to reduce the number of lower level employees to which it applied by increasing the level of compensation needed to trigger reporting, and require the reporting of additional information, "**without including names**" of any employees or officers. (P.02-12-039 at p. 4 (Emphasis added.) We recognize that the reasoning behind allowing utilities the option of providing a public GO 77 report with employee names redacted would similarly support redaction of the names of attorneys and executives as well. We assume, however, that executive compensation information is often available outside the context of GO 77 reports, in securities filings and annual reports of public utilities subject to such reporting requirements. We note that both PG&E and G/LIF comment that names of executive officers should be disclosed, though PG&E also expressly favors redaction of the names of its attorneys. This may be splitting hairs too finely. We will permit utilities that wish to file public reports with names redacted to redact all individual names, so long as they also file an unredacted GO 77 report for use in our proceedings. This is an option, not a requirement, and utilities that wish to continue to file only one complete, unredacted, report may do so.

D. D.04-08-055 Modifications

Although we do not find legal error, we will clarify D.04-08-055's discussion of § 583 and expand the scope of name redactions permitted in public GO 77 reports. We believe that D.04-08-055 may easily be modified to better serve our interests and the interests of utilities subject to GO 77-L. Therefore, we will modify D.04-08-055 as follows:

First, we will delete the statement that the scope of R.03-08-019 was limited to our consideration of whether to place conditions on the public disclosure of only the names of employees who were not executive officers or attorneys. G/LIF in P.02-12-039 proposed what amounts to the redaction of all names in GO 77 reports. We will provide utilities the option of filing a public version of GO 77 reports with all employee, attorney, and executive names redacted, as long as they also submit a complete, unredacted, version of the report that may be reviewed, and used, by parties to our proceedings. Second, we will replace references to the acceptance of reports "subject to § 583," with references to reports that will not be disclosed in the absence of authorization by the Commission, or by a presiding officer during the course of a proceeding. This approach is intended to provide some informational privacy without hampering the use of GO 77 reports in Commission ratesetting proceedings, and other proceedings in which such reports may be useful.

In summary, our longstanding full disclosure of GO 77 reports does not violate the federal or state constitutions, the CPRA, or the IPA. We further hold – based on long experience – that Applicants' concerns regarding our limited disclosure of names, job titles, duties, and compensation information exceed any realistic evaluation of any likely harm related to the continued disclosure of such information. At the same time, we understand that there may be ways to meet our regulatory needs without making as many names as easily available to the public.

II. CONCLUSION

For the reasons stated above, we deny the applications for rehearing of D.04-08-055, as modified herein.

THEREFORE, IT IS ORDERED that:

1. The Application filed by Calaveras Telephone Company, Cal-Ore Telephone Company, Ducor Telephone Company, Foresthill Telephone Company, Global Valley Networks, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Company, The Ponderosa Telephone Company, Sierra Telephone Company, The Siskiyou Telephone Company, Volcano Telephone Company, Winterhaven Telephone Company (Applicants) for rehearing of D.04-08-055, as modified herein, is denied.

2. D.04-08-055 is modified as follows:

   a. On page 1, the paragraph numbered (3) is replaced by the following:

      Allows utilities the option of filing information on the names of individuals in a conditional access report that will not be disclosed to the public in the absence of authorization by the Commission, or by a presiding officer during the course of a proceeding, on the condition that utilities that choose this option also file a report for public inspection with individual names redacted.

   b. On page 8, in the first line of the first full paragraph, the phrase "under § 583" is replaced by the following: "as confidential."

   c. On page 8, in the first full paragraph, the last two sentences are replaced with the following:

      We will order that utilities may report the names of highly compensated individuals in conditional access reports that will not be disclosed to the public in the absence of authorization by the Commission, or by a presiding officer during the course of a proceeding, on the condition that utilities that choose this option also file a report for public inspection with individual names redacted.

   d. On page 8, after the first full paragraph, the following new paragraphs are added:

      We have repeatedly found that we need the identity of utility executive officers, attorneys, and other highly compensated employees in order to determine whether utility compensation is reasonable, whether ratepayers are being charged for work done for utility affiliates, and whether utility

compensation practices are appropriate. If this information is to remain useful to the Commission, it must be readily available to the Commission, Commission staff, and parties to Commission proceedings.

During a proceeding, any party desiring to review individual names in conditional access GO 77 reports in order to determine whether the names may be relevant or useful during the party's participation in the proceeding may file with the presiding officer a request for access to such reports, and presiding officers are authorized to grant such requests. Any person who is not a party to a Commission proceeding and who desires to review individual names in conditional access GO 77 reports may file with the Executive Director a request for access to such reports, and the Commission may authorize disclosure in appropriate circumstances.

e. On page 16, Conclusion of Law 5 is replaced by the following:

Utilities should have the option of reporting the names of highly compensated individuals in conditional access reports that will not be disclosed to the public in the absence of authorization by the Commission, or by a presiding officer during the course of a proceeding, on the condition that utilities that choose this option also file a report for public inspection with individual names redacted.

f. On pages 16 and 17, Ordering Paragraph 3 is revised to read:

Utilities may report the names of highly compensated individuals in conditional access reports that will not be disclosed to the public in the absence of authorization by the Commission, or by a presiding officer during the course of a proceeding, on the condition that utilities that choose this option also file a report for public inspection with individual names redacted.

g. On page 17, Ordering Paragraph 4 is renumbered as Ordering Paragraph 5, and the following new Ordering Paragraph 4 is added:

During a proceeding, any party desiring to review individual names in conditional access GO 77 reports in order to determine whether the names may be relevant or useful during the party's participation in the proceeding may file with the presiding officer a request for access to such reports, and presiding officers are authorized to grant such requests. Any person who is not a party

to a Commission proceeding and who desires to review individual names in conditional access GO 77 reports may file with the Executive Director a request for access to such reports, and the Commission may authorize disclosure in appropriate circumstances.

This order is effective today.

Dated April 7, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners